

MINUTES

MONTANA SENATE 57th LEGISLATURE - REGULAR SESSION CONFERENCE COMMITTEE ON HOUSE AMENDMENTS TO SENATE BILL 135

Call to Order: By **CHAIRMAN ROYAL JOHNSON**, on April 9, 2001 at 9:30 A.M., in Room 350 Capitol.

ROLL CALL

Members Present:

Sen. Royal Johnson, Chairman (R)
Rep. Dave Lewis, Vice Chairman (R)
Rep. John Esp (R)
Sen. Jerry O'Neil (R)
Rep. Trudi Schmidt (D)
Sen. Mignon Waterman (D)

Members Excused: None.

Members Absent: None.

Staff Present: David Niss, Legislative Branch
Mary Gay Wells, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Executive Action: SB 135 Accepted as Amended
By the House

{Tape : 1; Side : A; Approx. Time Counter : 0}

HEARING ON SB 135

Comments and Questions from Committee Members and Responses:

CHAIRMAN ROYAL JOHNSON opened the meeting. He asked **SEN. MIGNON WATERMAN** to explain her bill and where it stood at the moment.

SEN. WATERMAN explained that the issue they would look at was the subpoena power for the mental health managed care ombudsman. This is a fairly common power for an ombudsman to have. The issue arose because of a specific instance where **Bonnie Adee, Mental Health Coordinator**, was asked by a client to investigate why the client was being billed when the client felt she was covered by Medicaid. The provider refused to give **Ms. Adee** records and material pertaining to the client which would have shown the lady truly did not owe the money. Ultimately it was resolved. Because of this, language was added to the bill to help out when necessary. The subpoena power was taken out by the House. **SEN. WATERMAN** would have preferred to have the language restored to the bill, but realized that would probably not happen. She wanted to narrow the language to just papers and documents, etc. She offered an amendment **EXHIBIT (ccs80sb0135a01)** that would grant subpoena powers for papers, documents, etc.

REP. JOHN ESP informed the committee that there had been a great deal of concern in his committee during executive action about the subpoena powers and there was widespread agreement that they did not feel it was appropriate. They then put an amendment on to strike the subpoena power. He had spoken to **Ms. Adee** and she told him that it would be nice to have but not necessary. There are four attorneys on the Human Services Committee and not many of them liked the idea of giving an employee of the governor the powers of subpoena. They suggested if she needed records, she could go to court and get a subpoena. Also, a hospital has to given a private individual their records by law.

Bonnie Adee, Mental Health Coordinator spoke to the issue. She did feel that the subpoena power was not so critical so as to jeopardize the other changes in the bill. It is a power that would be useful to the office, perhaps as much in the perception of it as in the use of it. The limiting of the power to papers, documents and pertinent evidence would be fine. The office of the ombudsman is intended at times to investigate facts. They would neither be an advocate for the consumer or the agency involved. Sometimes that necessitates looking at documents that describe how things are working. The above incident involved a private provider that had a contract with a managed care company. Without being able to see the contract which was described as proprietary and not available to her, she did not understand how the provider needed to pay or how the consumer needed to pay. Having that document would have made everything much more clearly and would have resolved the issue much more quickly. It was not something that comes up very often.

REP. ESP wanted to know what "production of books" meant. **David Niss, Legislative Branch**, commented that was a very common phrase

used in grants of subpoena power. Typically, it referred to the kinds of paper documents such as ledgers. Production means produce; for example, "He will produce the books or papers."

SEN. JERRY O'NEIL asked if "books" meant company books. **Ms. Adee** offered that she couldn't imagine ever having to look at a provider's books. She might need to look at billing records for an individual. That would be different than the company books.

CHAIRMAN JOHNSON thought there might be a better choice of words.

REP. ESP questioned **REP. JIM SHOCKLEY, HD 61** about the subpoena powers. **REP. SHOCKLEY** contended that subpoena powers are very, very powerful tools. This bill would put it in the hands of a non-elected person with no legal training. Either of those positions would make it dangerous. It was not appropriate to give the subpoena powers to someone like this. He still felt that they would have to comply with a portion of the statutes called the Administrative Subpoenas. If one were not legally trained, it was a difficult process. It can mess up a case if it is not done right.

SEN. WATERMAN asked **David Niss** to tell the committee who has subpoena powers. **Mr. Niss** said there needs to be a distinction made in the administrative agencies' subpoena powers. Between those agencies that have this power, for purposes of contested case hearings and those agencies which have the power for purposes of investigation, they are not necessarily tied to a contested case hearing under MT Administrative Procedure Act (MAPA). When it involves a contested case hearing under MAPA, every agency is given subpoena power by MAPA (2-4-104). So everything that is defined as an agency in Montana is defined in MAPA as to who has subpoena power both as to people and their records for the purposes of contested case hearings. The second type of administrative agencies' subpoenas are those only for investigative purposes and not every agency has those. Before coming to the meeting, he did a computer search of all the state's statutes involving investigatory subpoenas and where that word "investigatory" wasn't used, he actually looked at the section of law. There are about 40 different sites in statute of investigative subpoena powers to agencies in the state--not necessarily connected with the authority to hold contested case hearings. He handed out a sheet showing the statutes

EXHIBIT (ccs80sb0135a02) .

CHAIRMAN JOHNSON commented that with the above explanation, how would this particular amendment fit in with what the committee seemed to be trying to do. Did **Mr. Niss** see this situation the same at the other 40 places that allow this. **Mr. Niss** said yes.

CHAIRMAN JOHNSON further commented that if the amendment was not accepted, there would be other places in statute that would be helpful to **Ms. Adee**. **Mr. Niss** said that was correct and those 40 other places apply to agencies, boards, commissions, etc. other than the mental health ombudsman. He did not want to give the impression that these apply to the mental health ombudsman.

CHAIRMAN JOHNSON asked if the amendment covered what the committee was trying to do if the committee voted in the affirmative. **Ms. Niss** said yes.

REP. ESP was not in agreement. He did not understand why the Senate took out the attorney general as the legal counsel for the ombudsman.

SEN. WATERMAN informed him that the attorney general asked to be taken out. If the ombudsman was investigating a state agency for a client, the attorney general would be representing the state agency and it would be a conflict of interest for him to also represent the ombudsman.

SEN. JERRY O'NEIL asked if the subpoena would be used by the ombudsman, would she have an attorney's help. **Ms. Adee** did not have an attorney within the ombudsman's staff. She did have the authority to hire an attorney but was working with very limited funds.

REP. ESP wondered if the attorney for the ombudsman could request a subpoena. **Mr. Niss** responded that it would depend upon the authority which the office of the ombudsman could exercise. If that office could initiate or respond to litigation thereby becoming a party to litigation, or if that office could initiate or respond to administrative actions then there are currently rules and statutes giving the attorneys authority either in administrative actions or in district court to exercise independent subpoena powers. For the purposes of administrative action (2-4-104) which gives agencies the authority to use that, this was typically used by their legal counsel. It depended on the other authority in statute to either initiate or respond to administrative legal actions or judicial legal actions.

REP. DAVE LEWIS elaborated that he had been around the capitol for a long time and his memory was good. He would not want to give an appointee of the governor subpoena powers. This action might be something they would regret down the road. This was not a reflection on the ombudsman or governor. He did not know who would be in those positions in the future and could not agree to restoring the language. Things happened long ago with investigative powers that no one would like to go back to. If

someone in the governor's office wanted some information on someone else, it would be possible even though it would be limited.

REP. ESP described the feelings of the House concerning the subpoena powers. He did not believe the bill would pass if the subpoena power were to be put back into the bill.

REP. TRUDI SCHMIDT agreed with **REP. ESP'S** statement. There was a strong concern about giving subpoena powers to the ombudsman.

REP. ESP asked in the cases that were cited, were they mostly boards who would have subpoena powers. **Mr. Niss** answered that it varies, though in most cases the counsel for the agency, board or commission exercises that authority. In 37-3-107, that gives the power to the entity rather than to the legal counsel.

Motion/Vote: **SEN. WATERMAN** moved that **SB 135 BE AMENDED (EXHIBIT 1)**. Motion failed 3-3 with Representatives Esp, Lewis and Schmidt voting no.

{Tape : 1; Side : B; Approx. Time Counter : 0}

Motion/Vote: **SEN. WATERMAN** moved **TO KEEP SB 135 AS AMENDED BY THE HOUSE**. Motion carried 5-1 with Sen. Johnson voting no.

ADJOURNMENT

Adjournment: 10:15 A.M.

SEN. ROYAL JOHNSON, Chairman

MARY GAY WELLS, Secretary

RJ/MGW

EXHIBIT (ccs80sb0135aad)